United States Court of Appeals

for the Second Circuit

REPLY BRIEF

ORIGINAL

76-4125

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ESTATE OF ANTON L. TRUNK, Deceased,
Clara P. Trunk, Executrix,

Petitioner-Appellant

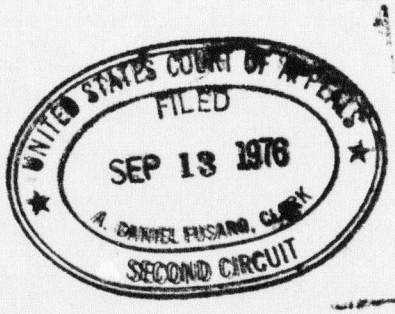
v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

On appeal from the United States Tax Court

REPLY BRIEF FOR PETITIONER-APPELLANT



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Printinghouse Press — Bar Ass'n Steno Serv. (Appeals Section) 212-687-0384

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REPLY BRIEF OF THE ESTATE OF ANTON L. TRUNK,

DECEASED,

CLARA P. TRUNK, EXECUTRIX, PETITIONER-APPELLANT

REPLY TO ARGUMENT

I

THE MARITAL DEDUCTION ISSUE

A. The Commissioner's first argument avoids the issue. At Page 20 of his brief, the Commissioner proposes an allegedly "not unreasonable" interpretation of the crucial passage of Paragraph SEVENTH of decedent's Will. In addition, the Commissioner suggests that this passage was inserted by the decedent to show the trustee his concern as to the form of the trustee's certification in the event of the payment of $200,000. to petitioner. The Commissioner's arguments, however, avoid the real issue, which is the effect of the Tax Court ruling that the disputed passage of decedent's Will was ambiguous (A-90; A-156). It puts the cart before the horse to urge that one or another interpretation of the passage is "unreasonable" without first deciding whether the testimony of decedent's attorney relating conversations with decedent which explained testator's intent in the crucial passage, is admissable. If the attorney's testimony is taken into the record, both the Tax Court and the Commissioner should be foreclosed from offering their own interpretations of decedent's Will, for the best evidence of decedent's intent is obviously decedent's own explanation to his attorney.

B. The effect of the Will's use of decedent's own words. At Page 21 of his brief, the Commissioner twists the testimony of decedent's attorney in claiming that he "...clearly testified that there was no error in the Will's reflection of the testator's intent...", because decedent dictated the actual words used in the Will. When the attorney's testimony is read in context, however, it will be seen that he said exactly the opposite, namely, that although the words in the Will were chosen by decedent, they were so ambiguous that the testator's intent was not clearly reflected in those words (A-95; A-98-99). The cases and authorities cited by the Commissioner on Page 21 of his brief, including Wigmore, are distinguishable from our case, for none of them deal with the Will where the language is ambiguous. Instead, as exemplified by the discussion in Wigmore, those cases deal with a situation where the language in the Will is clear and unambiguous, but testimony is offered to show that the decedent erred in describing the object of his bounty or the subject of the gift. In our case, neither the object of the bounty (petitioner) nor the subject of the gift ($200,000.) is erroneously, although clearly described, but rather the intent of testator with respect to petitioner and the money is ambiguous. In such circumstances, testimony is admissable to explain the ambiguity as more fully discussed in petitioner's brief.

C. The $200,000. did not exist separately. On Page 23, footnote 6 of his brief, the Commissioner argues that the $200,000. does not qualify for the marital deduction because although petitioner had the right of appointment of that sum, she did not have a life interest in the $200,000. This argument assumes that the $200,000. was a separate res in which a life tenant was

given a life interest. Such a conclusion cannot be drawn from the words of the Will, for it is clear that the $200,000. referred to was not a separate asset of cash or property, but merely an amount which could be carved out of the principal of TRUST TWO. Also, it is plain that petitioner had a life interest in all of the assets of TRUST TWO, which would include the $200,000. until it is carved out and given to her, under her power of appointment.

D. Petitioner's interest in the $200,000. was not terminable. At pages 23 - 27 of his brief, Commissioner claims that three "acts" had to occur in order for petitioner to get the $200,000. and, because these acts could not be done until after decedent's death, the Commissioner claims that petitioner's interest was terminable and did not meet the requirements of IRC §2056(b)(1). In support of this position, the Commissioner cites a number of cases, including Allen vs. United States, 359 F.2d 151 (1966); Estate of Ray vs. Commissioner, 54 T.C. 1170 (1970); Estate of Neugass vs. Commissioner, 65 T.C. 117 (1975), on appeal (C.A. 2, No. 76-4112).

This argument is erroneous because the acts pointed to by the Commissioner were merely formal limitations or immaterial powers and not acts which had independent significance as required of the widows in the cases cited by the Commissioner.

The first act, that the trustees "certify in writing that it is requisite, necessary or desirable to borrow a sum of money" must be judged in the light of the testimony of decedent's attorney to the effect that he understood from decedent that petitioner's request for the money was actually a mandate to make the payment (A-95 - 96). All that remained to be done upon

receipt of the request was for the trustee to put into writing his conclusion as to whether or not it was necessary to borrow the money to pay petitioner or whether that was more desirable than to sell trust assets in order to provide those funds. As clearly explained by the Commissioner's own regulations, such an act by the trustee is a merely formal limitation which does not make the interest or power terminable. Regulation 20.2056(b)-5 (g)(4).

The second act, that petitioner's request for the money be put to the trustee in writing, is similarly a mere formality of the type referred to in the above cited regulation and also does not make the interest or power terminable.

The third act cited by the Commissioner, that the wife determine that the borrowed money is not needed to pay estate taxes, certainly does not appear in the Will as claimed by respondent. However, even assuming that petitioner did have to make such a determination, the power of petitioner to use the money to pay estate taxes is immaterial where, as here, she also has the power to appoint that same money to herself. It is evident that petitioner's right to use the $200,000. to pay estate taxes is optional and not mandatory as far as she is concerned and the possession of such optional but lesser power, along with a general power of appointment, does not make the interest terminable and thereby disqualified for the marital deduction. Revenue Ruling 72-154 (1972-1C.B. 310)

Furthermore, the cases cited by the Commissioner at pages 26 and 27 are distinguishable from the facts in our case. In the cases of

Allen v. United States, supra and Estate of Ray v. United States, supra, the Will not only required the widow to make a written request for the bequest in issue but also placed a condition on the widow to perform substantive acts in addition. These acts by the widow in the Allen case required a binding agreement to leave the widow's estate to certain named individuals, and in the Estate of Ray case to make a binding agreement to bequeath property to a named individual. It is conceivable that the widows in those cases might refuse to make such agreements with respect to the disposition of their estates, and, therefore, the powers given to them under the decedent's Wills were, in fact, conditional. In the instant case, there is no substantive condition placed upon Petitioner in exchange for her appointment of the $200,000 to herself and thus, her interest was not conditional. In the case of Neugass v. Commissioner, supra, the widow was required to elect to take certain property within six months of decedent's death following which her right to election would lapse. The Tax Court's decision in that case pointed out that where a power may lapse before the widow's death by the mere passage of time, that power is not "exercisable in all events". Neugass is on appeal to this court, but its outcome will not affect our case, for in our case the Petitioner's right to appoint the $200,000 continued during her entire life and, therefore, could not be terminated during her life by any event other than her complete exercise or release of it.

II

THE APPORTIONMENT ISSUE

In the Tax Court's opinion and again in the Commissioner's brief, it is argued that because there is no general provision in decedent's Will directing the apportionment of estate taxes among the several beneficiaries, the directions as to payment of taxes in paragraphs "SIXTH", "SEVENTH" and "EIGHTH" of the Will do not satisfy the "unless otherwise provided" requirements of Section 2-1.8 (b) of the Estates Powers and Trusts Law of New York. Petitioner's main brief has explained that although decedent was apparently content to have Section 2-1.8 (a) of the Law applied with respect to apportionment among the beneficiaries, he clearly provided for the apportionment as between principal and interest in the payment of the estate tax due from the three trusts under paragraphs "SIXTH", "SEVENTH" and "EIGHTH" of the Will. Nevertheless, the Commissioner puts forward the Tax Court's theory that because of a difference in the language directing the apportionment between paragraphs "SIXTH" and "SEVENTH" on the one hand, which direct that the estate tax be paid out of income, and paragraph "EIGHTH", which refers to the payment of estate tax out of principal, that such directions are only an indication of the source rather than a binding direction for the apportionment between principal and interest.

What is overlooked by both the Tax Court and the Commissioner, is that the distinction between the language used in paragraphs "SIXTH" and SEVENTH" and the language used in paragraph "EIGHTH" is related to the nature of the property which went into the three trusts.

TRUSTS ONE and TWO received property which yielded income in the technical sense. By contrast, TRUST THREE, under paragraph "EIGHTH" of the Will, received a contract on which only principal payments were to be made. Thus, because of the nature of the trust res in TRUST THREE, decedent used the term "principal" in order to describe the receipts from that Trust which, nevertheless, were distributed to the "income" beneficiaries of the Trust. Decedent's use of the word "principal" in directing the payment of estate tax for TRUST THREE was accurate and well chosen, for he knew there would be no "income" in the technical sense, in that Trust and the only word which he could use to refer to the receipts was "principal". In TRUSTS ONE and TWO, decedent specifically directed that the estate tax be paid out of the income, for he knew there would be income in the technical sense in those Trusts. It is submitted that the decedent's careful instructions with respect to the payment of estate taxes due from TRUSTS ONE, TWO and THREE were a clear provision not only of the source but also a clear direction as to apportionment which satisfies Section 2-1.8 (b) of the Estates, Trusts and Powers Law.

CONCLUSION

The decision of the Tax Court should be reversed.

Respectfully submitted,

Jerome Kamerman
Attorney for Petitioner-Appellant

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket
No. 75-4125

ESTATE OF ANTON L. TRUNK, Deceased,
Clara P. Trunk, Executrix,
Petitioner-Appellant,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 101 West 80th St., New York, N.Y. 10024

That on September 13 *19* 76 *deponent served the annexed*
REPLY BRIEF FOR PETITIONER-APPELLANT
on Daniel Ross, Esq., Appellate Section of Tax Division, U. S. Department of Justice
attorney(s) for Respondent-Appellee
in this action at Constitution Ave. bet. 9th & 10th Sts., Washington, D.C. 20530
the address designated by said attorney(s) for that purpose by depositing four true copies of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me

September 13, 1976.

George Cohen
GEORGE COHEN
Notary Public, State of New
No. 31-0682100
Qualified in New York County
Commission Expires March 30, 1977

August De Fonse

The name signed must be printed beneath

AUGUST DE FONSE